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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78

RICHARD K. HALEY, *Petitioner*

VS.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RICHARD K. HALEY, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Richard K. Haley, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Sixth Circuit, affirming the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, which imposed an Internal Revenue Service tax assessment contested by Petitioner as being invalid for failure to give the required statutory Notice of Deficiency.

OPINION BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, was unreported at time of writ and appears in Appendix (A) at page 1.

The opinion of the United States District Court for the Southern District of Ohio is reported in 76-2 U.S.T.C. 9683 (1976) and appears at 2.

JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was entered July 6, 1978 (A-1). A Petition for Rehearing en banc was denied August 15, 1978 (A-18). Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari in United States Supreme Court was denied August 28, 1978 (A-19). The mandate of the United States Court of Appeals, Sixth Circuit, was officially docketed September 6, 1978. Petitioner's request to Certify Entire Record to the United States Supreme Court was docketed in the United States Court of Appeals, Sixth Circuit, October 19, 1978.

Petitioner's application to the United States Supreme Court for an Extension of Time to File Petition for Writ of Certiorari was presented to Mr. Justice Stewart on October 4, 1978 and an Order was entered extending the time to and including December 5, 1978 (A-20).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), Petitioner having received final judgment in a civil case from a Court of Appeals on an issue addressing the interpretation and application of federal law to the prejudice of Petitioner.

QUESTION PRESENTED

WHETHER THE INTERNAL REVENUE SERVICE SATISFIES ITS STATUTORY OBLIGATION TO GIVE NOTICE OF DEFICIENCY TO A TAXPAYER (26 U.S.C. §

6212(b)(1)), WHERE THE REVENUE AGENT IN CHARGE OF AUDITING A TAXPAYER HAS ON FILE A POWER OF ATTORNEY DIRECTING ALL CORRESPONDENCE BE SENT TO HIS ATTORNEY IN FACT AND ACTUAL KNOWLEDGE OF TAXPAYER'S CURRENT ADDRESS, BUT SENDS NOTICE OF DEFICIENCY TO A DEFUNCT MAILING ADDRESS AND IT IS RETURNED UNDELIVERED?

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT, UNITED STATES CONSTITUTION (A-13).

STATUTES INVOLVED

TITLE 26 U.S.C. § 6212 (a) and (b)(1) (A-21), TITLE 26 U.S.C. § 6213 (A-22).

STATEMENT OF THE CASE

The 1968 and 1969 Federal Income Tax returns of Petitioner, Richard K. Haley, D.O., were simultaneously audited by revenue agent, Kathryn Leggett. Petitioner retained Harold L. Libby, a certified public accountant and tax attorney, to represent him in these matters. A Power of Attorney was filed with the Service, directing all correspondence addressed to Petitioner be sent to Mr. Libby as his designated attorney-in-fact. A tax deficiency determined by agent Leggett for the year 1969 was contested by Mr. Libby by Appeal to the Internal Revenue Service. A substantial settlement was reached on Petitioner's purported 1969 tax liability. It is the 1968 deficiency which is the subject matter of this Petition.

Revenue agent Leggett informed Mr. Libby that she would contact him regarding her conclusions on the 1968 audit. Though agent Leggett did contact Mr. Libby with regard to the 1969 audit, she did not do so regarding any 1968 tax liability. Nor did agent Leggett, or any member of the Internal

Revenue Service, give actual notice to Petitioner of a tax deficiency for 1968.

Petitioner's personal residence was located at 5025 Warner Road, Westerville, Ohio. This location is also known as 5858 Edlor Drive, Westerville, Ohio. In 1968 and 1969, Petitioner had experienced vandalism problems with his mailbox at his home residence. His postman suggested the use of his office address. In 1969, Petitioner filed the appropriate form with the Westerville Postmaster to have all of his mail delivered to his office address at 1248 S. High Street, Columbus, Ohio. Revenue agent Leggett was knowledgeable of this address. She knew Petitioner conducted an active medical practice at the S. High Street office. Agent Leggett had physically conducted part of her investigation at Petitioner's office address.

In the fall of 1972, Petitioner executed a waiver extending the statute of limitations for the Internal Revenue Service to contest his tax liability for the year 1968 until June 30, 1973. Petitioner did not receive the waiver in the mail. His accountant, Mr. Libby, delivered it to his office on S. High Street.

On June 14, 1973, a statutory notice of deficiency for the year 1968 was mailed to Petitioner at 5858 Edlor Drive, Westerville, Ohio. The notice was returned to the Internal Revenue Service marked, "No Mail Receptacle, Order Expired 6-16-73." On June 20, 1973, the International Revenue Service official charged with mailing such notices, Mr. Spaeth, called Revenue Agent Leggett for a better address. Agent Leggett testified before the District Court that "normally we would give the business address if we don't have a good residence address." In the case of Petitioner, she provided the Warner Road address only. A second notice was sent to 5025 Warner Road. It was undisputed that the Warner Road and Edlor Drive addresses are in fact the same residence. Consequently, the second notice was also returned to the Service marked, "No Mail Receptacle, Order Expired." The statute of limitations for initiating a tax

liability against Petitioner, addressing the year 1968, terminated on June 30, 1973.

It was stipulated by the parties that Petitioner never received actual notice of deficiency within the time prescribed by law. The Internal Revenue Service never sent a statutory Notice of Deficiency to Mr. Libby although a Power of Attorney had been filed by him with the Service. The Internal Revenue Service never sent a statutory Notice of Deficiency to Petitioner's business office on S. High Street, or made any attempt to contact him at his office regarding the purported deficiency.

Petitioner did not know the government was deposing a deficiency for 1968 until well after the time for petitioning the United States Tax Court had expired. A formal assessment was entered against Petitioner rendering him a tax debtor subject to collection process. The Internal Revenue Service used Petitioner's business address for the assessment. The Internal Revenue Service also used the S. High Street address to perfect service on the Complaint issued against Petitioner in the herein matter.

The United States of America, Respondent, initiated civil action in District Court to collect the assessed income tax liability against Petitioner. The matter was tried on January 5, 1976. Petitioner argued that the assessment for additional tax due for the calendar year 1968 was not lawful; that he never received the statutory Notice required to be sent to his "last known address" under 26 U.S.C. § 6212(b)(1); that a proper notice of deficiency would have enabled him to contest the alleged tax liability on the merits in the United States Tax Court as he had successfully done with his alleged 1969 deficiency; and that through no fault of his own, he was rendered a tax debtor for the sums purportedly owed without benefit of petition to the Tax Court under 26 U.S.C. § 6213(a). Petitioner also contended that the failure of the Internal Revenue Service to give statutory notice of deficiency within the time allotted

by the statute of limitations rendered a deficiency suit for 1968 time-barred.

The District Court found that the Internal Revenue Service complied with its minimum statutory duty under 26 U.S.C. § 6212(b)(1); that statutory notice of deficiency did not require notice to be sent to a taxpayer's best address, but only to the address which, under the circumstances, the Internal Revenue Service reasonably understood the taxpayer wished the notice to be sent.

The Court of Appeals affirmed the District Court's determination. It is from these adverse decisions that Petitioner seeks relief.

REASONS FOR GRANTING WRIT

i). The Sixth Circuit has interpreted and applied the statutory obligation of the Internal Revenue Service to give Notice of Deficiency to a taxpayer (26 U.S.C. § 6212(b)(1)) in a manner which conflicts with the policy of law construed by other Circuit Courts; and,

ii). The interpretation and application of 26 U.S.C. §6212 (b)(1) addresses an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

THE INTERNAL REVENUE SERVICE DOES NOT SATISFY ITS STATUTORY OBLIGATION TO GIVE NOTICE OF DEFICIENCY TO A TAXPAYER, UNDER 26 U.S.C. § 6212(b)(1), WHERE THE REVENUE AGENT IN CHARGE OF AUDITING A TAXPAYER HAS ON FILE A POWER OF ATTORNEY DIRECTING ALL CORRESPONDENCE BE SENT TO HIS ATTORNEY IN FACT AND ACTUAL KNOWLEDGE OF TAXPAYER'S CURRENT ADDRESS, BUT SENDS NOTICE OF DEFICIENCY TO A DEFUNCT

MAILING ADDRESS AND IT IS RETURNED UNDELIVERED.

The Sixth Circuit's interpretation and application of 26 U.S.C. § 6212(b)(1) held that the Internal Revenue Service satisfied its statutory obligation to give a taxpayer Notice of Deficiency where such notice was not sent to the taxpayer's "best" address, known to the Service, but was sent to a defunct mailing address previously used by the taxpayer and returned to the Service undelivered. The Sixth Circuit's construction of 26 U.S.C. § 6212(b)(1) conflicts with the interpretation and application found by other Circuit Courts and is contrary to the policy of law suggested by the United States Supreme Court regarding a taxpayer's opportunity to petition the Tax Court for redetermination prior to assessment of a tax liability.

The legislative plan for notifying a taxpayer of deficiency has been found to contemplate that actual notice of the deficiency should be given where such can reasonably be achieved *Clodpelter v. Commissioner*, 527 F.2d 754 (9th Cir. 1975).

The purpose of the actual notice contemplated by the legislative plan is to allow for application for redetermination under 26 U.S.C. § 6213, and thereby give the taxpayer the opportunity to have the Commissioner's ruling reviewed by the Tax Court before it becomes effective. *Commissioner v. Stewart*, 186 F.2d 239 (6th Cir. 1951). As the High Court noted in *Laing v. United States*,

> "Denial of an opportunity to litigate in the Tax Court is out of keeping with the thrust of the code, which generally allows income taxpayers access to that court." 423 U.S. 161 (1976).

In keeping with the statutory purpose, it has been generally held that the words "last known address" in Subsection (b)(1) of 26 U.S.C. § 6212, should not be construed as creating a

mandatory address to which Notices of Deficiency must be sent. *Delman v. Commissioner,* 384 F.2d 929 (3rd Cir. 1967). Where a taxpayer files with the Internal Revenue Service a Power of Attorney directing all correspondence be sent to his designated attorney-in-fact, it has been found that the taxpayer gave his "last known address" for purposes of 26 U.S.C. § 6212 (b)(1). *Expanding Envelope & Folder Corp. v. Shotz,* 385 F.2d 402 (3rd Cir. 1967).

> "We think that when a taxpayer, through a duly executed and filed power, gives instructions such as those here given, he is in effect giving the Service a last known address for Section 6212 purposes. It is an address where he explicitly indicates he is likely to receive the notice," *Id* at 404.

Similarly, technical construction against the taxpayer has been found to be inappropriate where the purposes of the statutes have not been fulfilled through no fault of the taxpayer. *Tenzer v. Commissioner,* 285 F.2d 956 (9th Cir. 1960). A statutory duty has been imposed on the Commissioner to exercise reasonable care and diligence in ascertaining and mailing a deficiency notice to the correct address of the person or persons to whom the statutory notice must be sent. *Arlington Corporation v. Commissioner,* 183 F.2d 448 (5th Cir. 1950); *Estate of Francis P. McKaig Jr.,* 51 T.C. 331 (1968).

In the case at bar, the decision of the Sixth Circuit does not comply with the policy of law mandated in other circuit courts, or that suggested by the United States Supreme Court, regarding the statutory obligation of the Internal Revenue Service effecting notice of deficiency to a taxpayer. Contrary to the findings in other circuits, the Six Circuit held that 26 U.S.C. § 6212(b)(1) did not require notice of deficiency be sent to the "best" known address of a taxpayer or to the taxpayer's attorney-in-fact, even though the notice was returned to the Service undelivered. The holding is clearly at odds with the legislative plan of affording a taxpayer procedural due process

by way of petition to the Tax Court before a deficiency ruling becomes an effective tax assessment.

In *Flora v. United States,* 357 U.S. 63 (1958), the High Court noted the clear and distinct line between Tax Court jurisdiction and District Court jurisdiction in a refund suit. While the facts are not controlling in the herein matter, the Court's holding is instructive for purposes of construing the legislative intent of affording a taxpayer procedural due process in the Tax Court prior to effecting a tax assessment against him. The Court's narrow holding of law provided that full payment of a tax assessment may be compelled only where a deficiency had been noticed, that is, only where the taxpayer had access to the Tax Court for redetermination prior to payment.

CONCLUSION

Based on all of the foregoing arguments, Petitioner, Richard K. Haley, respectfully requests that his Petition be granted.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that a true and correct copy of the within Petition for Writ of Certiorari has been served upon William W. Milligan, United States Attorney, 85 Marconi Blvd., Columbus, Ohio 44315, the Solicitor General, United States Dept. of Justice, Washington, D.C. 20530, and Scott Crampton, United States Dept. of Justice, Washington, D.C. 20530, and Phillip I. Breman, United States Dept. of Justice, Washington, D.C. 20530, postage prepaid, on this ––– day of December, 1978.

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APPENDIX

76-2679

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

RICHARD K. HALEY,
Defendant-Appellant

Before: EDWARDS, LIVELY and ENGEL, Circuit Judges

Richard K. Haley, an osteopathic physician, appeals from a judgment entered against him and in favor of the United States in the district court for income tax deficiencies for the years 1968 and 1969, and interest and penalties accruing thereon. In his appeal Haley asserts that the assessment for additional tax due for the calendar year 1968 was not lawful since he failed to receive the statutory notice which was required to be sent to him at his last known address. 26 U.S.C. §6212(b)(1). He claimed that a proper notice would have enabled him to have pursued relief in the United States Tax Court without first paying the sums claimed due, instead of being required to pursue the allegedly impossible task of paying the monies due to the Internal Revenue Service as a condition precedent to his right to an action in the district court for refund. *See generally* 26 U.S.C. §§ 6213, 7422.

In his opinion accompanying the final judgment, the district court found that the defendant's residence was at all relevant times 5025 Warner Road, Westerville, Ohio, which was also described from time to time as 5858 Edlor Drive. The defendant consistently employed these addresses in his correspondence with the government regarding the 1968 tax year, including the waiver forms which extended the limitations on any government deficiency action to June 30, 1973.

It appeared from the proofs, as found by the district court,

that a statutory notice of deficiency for 1968 was mailed on June 14, 1973 to Haley at the 5858 Edlor Drive address and upon its return by the post office, was readdressed and remailed to him in timely fashion on June 20, 1973 at the 5025 Warner Road address. Neither attempt was successful in giving actual notice to the taxpayer, who argues that the suit for deficiency for 1968 is time-barred. The district judge, while holding that each case must necessarily rest upon its own facts, found guidance in this court's decision in *Williams v. United States*, 264 F. 2d 227 (6th Cir.), *cert. denied*, 361 U.S. 862 (1959), and correctly held that there was a sufficient compliance with the mailing procedures authorized by the Internal Revenue Code.

Appellant claims that the Service improperly disallowed certain deductions for the calendar years 1971 and 1972 and their carry-back to 1968 and 1969. The deductions represented alleged net operating losses incurred in the operation of a farm and a private flying service. Upon review it is apparent that these claims are entirely without merit. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Helman
Clerk

In The

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
OHIO, EASTERN DIVISION

NO. C-2-74-488

UNITED STATES OF AMERICA, *Plaintiff*

vs.

RICHARD K. HALEY, *Defendant*

[¶ 9683] United States of America, Plaintiff v. Richard K. Haley, Defendant. U.S. District Court, So. Dist. Ohio, East. Div., C-2-74-488, 9/14/76.

[*Code Secs. 172, 6213 and 7401*]

Suits by U. S. Prima facie correctness of assessment: Notice of deficiency: Last known address: Net operating loss: Inactive business.—In mailing deficiency notices to both addresses provided (without clear indication that another address was preferred) by the taxpayer with respect to the year in question, the IRS complied with its statutory duties, and the deficiency assessment for the tax year 1968 was effective. The statute does not require that notice be sent to taxpayer's *best* address, but only to that which, under the circumstances, the IRS reasonably understood that the taxpayer wished the notice to be sent. The Court held further that taxpayer was not entitled to a net operating loss for his farming or aviation activities since neither activity constituted a trade or business, and may not serve to reduce taxpayer's tax liability for the tax years 1968 and 1970. Therefore, the Court concluded that the taxpayer had failed to establish by a preponderance of the evidence that the deficiency assessment for the taxable year levied against him was factually incorrect. Back references: ¶ 1921.5043, 5322.5218 and 5752.53.

OPINION AND ORDER

KINNEARY, District Judge: This is a civil action brought by plaintiff, the United States of America, pursuant to Title 26, United States Code, Section 7401, to reduce to judgment the assessed income tax liability of the defendant, Richard K. Haley, for the tax years 1968 and 1969. The matter was tried to the Court on January 5, 1976 and, in accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The defendant, Richard K. Haley, is a practitioner of osteopathic medicine with a specialization in endocrinology. Many of Dr. Haley's patients suffer from obesity, for which Dr. Haley offers treatment.

The plaintiff claims that the defendant is indebted to it in the amount of $126,724.39, plus interest and penalties for unpaid federal income taxes by virtue of admitted liabilities on his 1968 and 1969 income tax returns, and by virtue of a deficiency for the year 1968. A delegate of the Secretary of the Treasury made assessments against the defendant for unpaid federal income taxes, for a deficiency with respect to income taxes for the year 1968 and for penalties and interest. Notice of assessment and demand for payment were made upon the defendant, but the amount remains unpaid.

The defendant's residence address was, during all relevant times, 5025 Warner Road, Westerville, Ohio. This location is also known as 5858 Edlor Drive, Westerville, Ohio. The defendant testified, however, that his mailing address was at all relevant times 1248 South High Street, Columbus, Ohio—the location of his office.

The defendant explained that his mailing address differed from his residence address because it was more convenient to receive mail at his office and because vandals had destroyed his residence mailbox twice. After once replacing the mailbox

at his residence address, the defendant decided to change his mailing address. He filed a change of address form with the Westerville post office in 1969 and he testified that, to the best of his knowledge, it was current in June of 1973.

The defendant testified that he received mail at his office address and that, to his knowledge, he never received any mail at his residence address after filing the change of address form. Further, he testified that he received other mail from the Internal Revenue Service at his office address.

The government introduced into evidence a waiver form extending the statute of limitations for the year 1968 to December 31, 1972, signed by the defendant, and dated March, 1972. The address indicated on this waiver form was 5858 Edlor Drive, Westerville, Ohio. Also introduced into evidence was another waiver form extending the statute of limitations to June 30, 1973 executed by the defendant in the fall of 1972. The address indicated on that form was 5025 Warner Road, Westerville, Ohio. The defendant testified that he did not receive the second waiver form in the mail but that his accountant, Mr. Harold Libby, delivered it personally to defendant's office and that the defendant then signed it.

On June 14, 1973 a statutory notice of deficiency for the tax year 1968 was mailed to the defendant at 5858 Edlor Drive, Westerville, Ohio. That notice was returned to the Internal Revenue Service in Cincinnati marked "No Mail Receptacle. Order Expired 6-16-73."

On June 20, 1973 a second statutory notice of deficiency for the year 1968 was sent to the defendant at 5025 Warner Road, Westerville, Ohio. This notice was returned marked "No Mail Receptacle. Order Expired."

Revenue Agent Kathryn Leggett testified that when the first notice was returned a member of the technical review staff of the Internal Revenue Service in Cincinnati contacted her for a better address. Not realizing that the Warner Road ad-

dress was the same as the Edlor Drive address, Ms. Leggett suggested the Warner Road address and the second statutory notice of deficiency was [were] sent. After the second notice of deficiency was returned, Ms. Leggett apparently did not suggest the defendant's business address, although she testified that it is her normal practice to provide a business address if a good residence address is not available.

The defendant testified that he never received a statutory notice of deficiency for the tax year 1968.

The defendant introduced into evidence copies of his income tax returns for the years 1971 and 1972, the first listing his address as South High Street, Columbus, Ohio and the second indicating the Warner Road address. Also introduced into evidence by the defendant is the notice sent to the defendant by the Internal Revenue Service indicating the income tax audit changes for the tax year 1968. That notice, dated April 6, 1972, lists the defendant's address as 5858 Edlor Drive, Westerville, Ohio.

At trial, the defendant also introduced into evidence several hundred cancelled checks claimed by him to reflect deductible expenses incurred in connection with his medical practice during the year 1968. The defendant failed to produce invoices evidencing the underlying obligations for which each check was issued, claiming that most of his records were subsequently destroyed through no fault of his own. More importantly, however, the defendant failed to testify with respect to the purpose, payee or circumstances surrounding the overwhelming majority of claimed deductions.

On cross-examination, it became clear that not every check represented legitimate business deductions and that at least certain purchases expensed in the year 1968 would more properly be characterized as capital items subject to depreciation over the useful life of the items.

In 1965 the defendant purchased a one hundred acre tract

of land located in Delaware County, Ohio. From the date of purchase until 1968, the defendant cut weeds on the property in order to keep the land presentable. He testified that although he purchased the property for the purpose of engaging in the business of farming, he did not have the farm equipment needed to properly farm the land.

In 1968, the defendant purchased a three hundred acre tract of land also located in Delaware County, Ohio. During that same year, he also purchased large farm equipment.

During his spare time in 1969, the defendant and his eight year old son planted soybeans on two hundred and ten acres of the three hundred acre tract of land. The defendant harvested the crop which yielded over 5,000 bushels of soybeans. The crop was stored in a metal bin on the property and was sold the following summer to a mill in Delaware County for approximately $7,200.00.

In 1970 the defendant again planted the same acreage with soybeans. He testified that he hired a man to harvest the crop and had given the man orders to store the soybeans in the metal bin for storage. The defendant testified that he did not know the yield of the crop that year and that the hired man stole the entire crop. The defendant has been unable to recover either the crop or its proceeds.

The defendant testified that only two hundred and ten acres of the one farm were tilled because, with his medical practice, he did not have enough time to farm more acreage. He also testified that he visited the farm only once every couple of months. He testified that he kept records of purchases and sales but that he was unable to produce them at trial.

The defendant testified that he was born and raised on a farm, and that before purchasing the acreage he consulted several sources as to the profitability of the farms. He insisted that his intent in purchasing the farms was to operate them as

a business and to make a profit. The defendant testified that although the one farm produced a cash income, neither farm produced a profit during the period that he owned them. He further testified that, had he been able to continue to operate the farms, he expected to make a profit.

The one hundred acre tract of land was foreclosed upon in 1971. No crops had ever been planted on the property by the defendant.

The three hundred acre tract of land was foreclosed upon by the mortgagee in 1972. It was defendant's recollection that only one payment had been made on the loan.

In 1966 the defendant purchased and financed a one propeller aircraft capable of seating six persons. The aircraft was modified by the addition of certain navigational instruments in order to make the aircraft serviceable for charter.

The defendant made arrangements with local pilots to charter the plane in exchange for an hourly rate of pay. This charter service was not incorporated but was a sole proprietorship. The defendant apparently took no active part in the operations of the charter service and no attempts were ever made to attract business beyond those made by the various pilots. The charter rate was $.25 per mile, which amount was paid to the pilot by the person chartering the aircraft. Sometime after the initial purchase of the original aircraft, according to the defendant, he instituted a flying school comprised of a number of aircraft kept in rental space in the terminal at Port Columbus. Instructors were made available to teach students.

The defendant was unable to recall at trial how many chartered flights were made during the time that he carried on this activity, although he did state that some chartered flights were made. He stated that he did keep records of the charter activities, but he was unable to recall even generally either the income generated by the activity or the expenses incurred.

The defendant testified that, at the time of the purchase of the aircraft, he was not a qualified pilot. Sometime after the purchase, however, he obtained his pilot's license. The defendant stated that there were occasions on which he used the aircraft for personal reasons. However, on such occasions, according to the defendant, he paid rent (presumably to himself) for the use of the aircraft.

In 1971 the finance company foreclosed upon the aircraft. The defendant testified that had he continued to operate the airplane charter service, he believed that he could have made a profit.

DISCUSSION

A. The Deficiency Notice for the Tax Year 1968. The parties to this action have stipulated that two notices of deficiency for the tax year 1968 were mailed to the defendant. Both were returned undelivered and the defendant now argues that neither notice constituted an effective statutory notice of deficiency.

Title 26, United States Code, Section 6212 does not require that notice of deficiency actually be received by the taxpayer but, rather, merely requires that the notice be sent to the taxpayer's last known address by certified or registered mail. *Luhring v. Glotzbach* [62-2 USTC ¶9548], 304 F. 2d (4th Cir. 1962); 5 Rabkin & Johnson, Federal Income, Gift and Estate Taxation §71.05 (1976). Although the term "last known address" is not statutorily defined, many courts have attempted to give the term substantive meaning. The court in *Berger v. Commissioner* [69-1 USTC ¶9103] 404 F. 2d 668 (3d Cir. 1968), for example, defined the term as "an address to which the Commissioner in all circumstances may reasonably believe the taxpayer wishes the notice sent." Accord, *Kennedy v. United States* [76-1 USTC ¶9229] 403 F. Supp. 619 (W. D. Mich. 1975).

The determination of a taxpayer's last known address must

necessarily depend upon the facts of each case. *Butler v. District Director of Internal Revenue* [74-1 USTC ¶9113], 369 F. Supp. 1281, 1283 (S. D. Tex. 1973). Ordinarily, a notice of deficiency is sent to the address of the taxpayer as shown on his return for the year in question. *Luhring v. Glotzbach, supra,* 304 F. 2d at 558. "However, if after the return is filed, the Government learns that the taxpayer has moved and has acquired a new address the notice must be sent to that address." *Butler v. District Director of Internal Revenue, supra,* 369 F. Supp. at 1283.

In his tax return for the year 1968—the tax year in question—the defendant used 5858 Edlor Drive as his address. Ordinarily, this address would be the proper address to which the statutory notice of deficiency is sent. Indeed, the first notice of deficiency was sent to this address. Subsequent to the filing of that return, however, the defendant used other addresses in his dealings with the Internal Revenue Service. For example, defendant's tax return for the year 1971 listed South High Street in Columbus as his address, but both of the waiver forms relating to the tax year 1968 and signed by the defendant indicated a Westerville address.

The defendant argues that, when the Internal Revenue Service learned that neither of its prior mailings of the deficiency notice reached him, it should have sent yet a third notice of deficiency to defendant at his business address.

It is undisputed that the Warner Road and Edlor Drive addresses are the same and that the defendant not only did reside at those addresses at the time the notices were mailed, but that he still resides there. It appears that none of the government personnel were aware, at the time of the mailing of the notices, that the two addresses were for the same residence. Delivery was attempted at the defendant's home, but because the defendant had earlier voluntarily removed the mail receptacle from his residence, delivery could not be completed. Further, the defendant's use of three different addresses in his dealings

with the Internal Revenue Service served to obscure his desired mailing address rather than to clarify it. While knowing that mail would not be delivered to his residence address, the defendant continued to use it in his dealings with the government without informing its agents of the situation. In all of his correspondence with the Internal Revenue Service with respect to the tax year 1968, it appears that the defendant consistently used either the Warner Road or the Edlor Drive addresses.

The parties have not directed this Court's attention to a single authority in which this precise factual situation is presented and the Court, in its own research, has found none. Although the determination of the issue of a taxpayer's "last known address" must necessarily turn upon the facts presented in each case, this Court finds some guidance in *Williams v. United States* [59-1 USTC ¶9282], 264 F. 2d 227 (6th Cir. 1959). In that case, the Commissioner had sent the notice of deficiency to the taxpayer in care of and at the address of the attorney in fact as required and directed in the power of attorney on file with the Service. The attorney returned the notice to the District Director, advising him that the attorney's power had been revoked by the death of the taxpayer. The Court of Appeals held the notice to be effective despite the fact that the District Director had in his files a residence address and a business address of the taxpayer. 264 F. 2d at 228.

> While we must agree with appellants that here the Director did not exert himself to see that the notice of deficiency reached proper hands, still we cannot say there was not minimum compliance with the mailing procedure authorized by §6212(a), (b)(1) of the Internal Revenue Code.

264 F. 2d at 229.

This Court is of the opinion that the government met the statutory requirements in mailing the notices of deficiency. The statute does not require that notice be sent to taxpayer's *best*

address, but only to that which, under all the circumstances, the Internal Revenue Service reasonably understood that the taxpayer wished the notice to be sent. In mailing the notice of deficiency to both of the addresses provided (without clear indication that another address was preferred) by the taxpayer with respect to the tax year in question, the Internal Revenue Service complied with its statutory duties, and the deficiency assessment for the tax year 1968 is therefore effective.

B. The Deficiency Assessment for the Tax Year 1968. The deficiency assessment levied against the defendant for the tax year 1968 is presumptively correct and certification of the assessment to the Court establishes a prima facie case of the liability reflected therein. *Gromacki v. Commissioner* [66-1 USTC ¶9414], 361 F. 2d 727 (7th Cir. 1966). The burden is placed upon the taxpayer to establish, by a preponderance of the evidence, that the assessment is erroneous. *Bar L Ramch, Inc. v. Phinney* [70-1 USTC ¶9399], 426 F. 2d 995 (5th Cir. 1979); *Rogers v. Commissioner* [40-1 USTC ¶9459], 111 F. 2d 987 (6th Cir. 1940); J. Mertens, The Law of Federal Income Taxation § 49.218; 5 Rabkin & Johnson, supra §73.03.

The defendant introduced into evidence over five hundred checks reflecting expenditures by him in excess of $110,000.00 (most, but not all of which related to 1968). The defendant testified that each check relates expenses incurred in the course of his medical practice during the tax year 1968, and he argues that the deficiency assessment is erroneous. The defendant further contends that, since the government did not introduce any contradictory evidence at trial, the facts supported by the defendant's evidence must be regarded as established.

As the defendant correctly argues, unchallenged evidence presented by the taxpayer is sufficient to overcome the presumption of correctness enjoyed by the government's deficiency assessment. However, merely because the government does not affirmatively refute each item claimed by the taxpayer as a

deduction, this Court is not compelled to accept the taxpayer's claims.

> We have repeatedly held that the taxpayer has made out his case when he has put in proofs, "clearly and distinctly tending to show" a determinating fact. . . . The presumption that the Commissioner is right is procedural and cannot survive such proofs *unless* they are challenged by contrary proofs, or destructive analysis and we have gone so far as to say that the taxpayer's affirmative evidence may itself contain the necessary challenge and furnish the material for such analysis.

Lunsford v. Commissioner [3 USTC ¶ 1037], 62 F. 2d 740, (6th Cir. 1933).

While the plaintiff did not accomplish, or even attempt, the virtually impossible task of presenting affirmative evidence tending to directly contradict each of the defendant's multitudinous claimed deductions, cross-examination of the defendant revealed that not every item claimed by the defendant on direct examination represented a legitimate business deduction. For example, the defendant admitted that checks made payable to the Westerville Jaycees and to *Playboy Magazine* were for personal use, although they are included in the group of checks claimed by him on direct examination to represent payment of dues and subscriptions incident to his medical practice. Likewise admitted to be a personal expense is a check made in payment for defendant's eyeglasses but included in the group of checks claimed by the defendant on direct examination to represent expenses for the purchase of drugs and professional service. Thus the cross-examination of the defendant cast a severe doubt upon the accuracy and reliability of defendant's claims. Further, the character, demeanor and answers of the defendant while on the witness stand lead this Court to find that the defendant's testimony is entitled to little credibility. Finally, the testimony of Revenue Agent Leggett, both on direct and cross-examination, failed to undermine the

procedures followed by her in her determination of the defendant's tax liability for the year 1968. Other than the cancelled checks and stubs, the defendant failed to produce any records whatsoever in support of his claims, and his recollection of the circumstances surrounding the issuance of each check was minimal, at best.

In short, it is the view of this Court that the defendant has failed to establish by a preponderance of the evidence that the deficiency assessment is incorrect.

C. Carryback Losses for the Tax Years 1968 and 1969. The defendant argues that he experienced net operating losses for the tax years 1971 and 1972, due primarily to the losses arising from the forced dispositions of his two farms and airplane, and that such losses must be carried back to the tax years 1968 and 1969, respectively, and thus serve to reduce his tax liability for those two years.

Title 26, United States Code, Section 172(a) allows as a deduction for the taxable year:

> an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year.

Section 172(b) provides in relevant part that "a net operating loss . . . shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss." It is clear, however, that before the defendant's argument can prevail, it must be established that his losses arose from the disposition of property or realty used in a trade or business conducted by him. Section 172(c), (d).

The defendant's returns for the tax years 1971 and 1972 reflect net operating losses which evidently were not disallowed by the Internal Revenue Service. However, the Service's failure to disallow such losses in 1971 and 1972 does not operate to preclude either the plaintiff or this Court from redetermining the nature of those losses for purposes of the establishing of defendant's tax liability for the years 1968 and 1969. *Howard v. United States* [74-1 USTC ¶ 9455], 497 F. 2d 1270 (7th Cir. 1974).

In *Penton v. United States* [58-2 USTC ¶ 9852], 259 F. 2d 536 (6th Cir. 1958), the Court of Appeals for this Circuit found important to the determination of whether the loss sought to be carried back occurred in the operation of the taxpayer's trade or business:

> (1) the continuity of the business, (2) the amount of time and energy devoted thereto by the taxpayer, and (3) whether the taxpayer is engaged in the business for the purpose of earning a livelihood or merely as an avocation.

259 F. 2d at 539. *See also* Title 26, Code of Federal Regulations Section 1.183-2; 5 J. Mertens, *The Law of Federal Income Taxation, supra* § 28.73.

The overwhelming burden of the evidence adduced at trial is that the defendant devoted extraordinarily little time to his extra-professional farming and aviation activities. While a portion of one farm was cultivated two of the five years that defendant owned it, the other farm was cultivated not at all. It is further evident that the defendant paid little personal attention to these activities. He admitted that he visited the farms only once every couple of months, explaining that his very busy medical practice did not leave him much spare time. Despite his inability to devote what would ordinarily be considered sufficient time to operate a farm in business-like manner, the defendant did not resort to qualified assistance in this operation, relying instead upon the additional efforts of his eight-year-old son and a man who was apparently not to be trusted without the close supervision that the defendant was unable to provide.

Although the evidence relating to defendant's aviation activities is quite sketchy, it appears that the defendant devoted

no more personal attention or time to this activity than he did to his farms. He evidenced at trial a surprising unfamiliarity with the operation of the "charter service" and "aviation school", ignorant even of the income produced and expenses incurred. Although the defendant claims to have lost the records kept in the course of these activities, this Court has no means of evaluating the defendant's method of conducting these "businesses".

This Court recognizes that there exist on the record facts tending to support the defendant's claim in this regard, yet, on balance and considering all the circumstances surrounding these activities, this Court concludes that neither the farming nor the aviation activities of the defendant constituted a trade or business.

This Court therefore concludes that the losses suffered by the defendant in 1971 and 1972 did not arise from the disposition of property used in a trade or business conducted by him and are therefore not subject to the net operating loss carryback provision of the Internal Revenue Code.

CONCLUSIONS OF LAW

This Court has jurisdiction over the subject matter of the action pursuant to Title 28, United States Code, Sections 1340, 1345, and Title 26, United States Code, Section 7402.

This Court has jurisdiction over the parties to this action.

This Court concludes that the deficiency assessment for the tax year 1968 levied against the defendant by the government was timely and legally made.

This Court concludes that the defendant has failed to establish by a preponderance of the evidence that the deficiency assessment for the 1968 taxable year levied against him is factually incorrect.

This Court concludes that neither the defendant's farming nor his aviation activities constituted a trade or business within the meaning of Title 26, United States Code, Section 172, and the losses arising out of such activities in 1971 and 1972 are therefore not subject to the net operating loss carryback provisions of that section and may not serve to reduce defendant's tax liability for the tax years 1968 and 1969.

The defendant remains indebted to the United States for the tax years 1968 and 1969 in the amount of $126,724.39, plus additional interest and penalties according to law.

WHEREUPON, the Court determines that judgment shall be entered in favor of the plaintiff, the United States of America, in the amount of One Hundred Twenty-Six Thousand Seven Hundred Twenty-Four Dollars and Thirty-Nine Cents ($126,724.39), plus interest and penalties according to law, as well as costs.

The Clerk shall enter judgment accordingly.

JUDGMENT

This action came on for consideration before the Court, Honorable Joseph P. Kinneary, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is in favor of the plaintiff, the United States of America, in the amount of One Hundred Twenty-Six Thousand Seven Hundred Twenty-Four Dollars and Thirty-Nine Cents ($126,724.39), plus interest and penalties according to law, and costs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

76-2679

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

RICHARD K. HALEY,

Defendant-Appellant

Before: EDWARDS, LIVELY and ENGEL, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration, and noting that the petition contains no issue which was not fully addressed in its earlier order, the court concludes that it is without merit. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By Grace Keller
Grace Keller, Chief Deputy

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

76-2679

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

RICHARD K. HALEY,

Defendant-Appellant

This cause is now before the court on motion of the appellant to stay the mandate of this court.

Upon due consideration,

IT IS ORDERED that the motion of appellant to stay the mandate be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 6, 1978

Ronald A. Marks, Esquire
Phillips & Marks
1421 East Market Street
Warren, Ohio 44483

Re. RICHARD K. HALEY vs. UNITED STATES
A-302

Dear Mr. Marks:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Justice Stewart who, on October 4, 1978, signed an order extending your time to and including December 5, 1978.

A copy of the Justice's order is enclosed.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By
Patricia A. Dean
Assistant Clerk

th
Enc.

cc. Hon. Wade H. McCree, Jr.
Solicitor General of the United States

Clerk, U.S. Court of Appeals for the
Sixth Circuit (Your No. 76-2679)

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 United States Code §§6212(a) and (b).

6212. Notice of Deficiency. [Sec. 1906(b)(13)(A) of P. L. 94-455, 90 Stat. 1834, amended this section by deleting "or his delegate" each place it appears therein.]

(a) In general.—

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for notice of deficiency

(1) Income and gift taxes and taxes imposed by chapter 41, [sic] chapter 42. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if

such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.
26 United States Code §§6213(a).

6213. Restrictions Applicable to Deficiencies—Petition to Tax Court. [Sec. 1906(b)(13)(A) of P. L. 94-455, 90 Stat. 1834, amended this section by deleting "or his delegate" each place it appears therein.]

(a) Time for filing petition and restriction on assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Supreme Court, U. S.
FILED
FEB 15 1979

No. 78-1061

In the Supreme Court of the United States

OCTOBER TERM, 1978

RICHARD K. HALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1061

RICHARD K. HALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether the decision below correctly held that the Commissioner of Internal Revenue mailed a statutory notice of deficiency for 1968 in accordance with the requirements of Section 6212(b) of the Internal Revenue Code of 1954 to petitioner's residence.

The pertinent facts may be summarized as follows: During the period in question, petitioner resided at 5025 Warner Road, Westerville, Ohio. That address is also known as 5858 Edlor Drive. Petitioner conducted a medical practice at 1248 South High Street, Columbus, Ohio. In 1969, as a result of vandalism to his residence mailbox, petitioner removed the mailbox at his residence and advised the post office that he wished mail delivered to his office address. However, petitioner did not advise the Internal Revenue Service that he wished to receive mail at his office. On his 1968 income tax return and a waiver extending the period of assessment for 1968 to

December 31, 1972, petitioner listed his address as the Edlor Drive residence. Another waiver form extending the period of assessment to June 30, 1973, bore the Warner Road residence address (Pet. App. 4-6).

On June 14, 1973, the Commissioner mailed to petitioner a statutory notice of deficiency for the year 1968 at the Edlor Drive address. The post office returned the notice to the Internal Revenue Service with the notation "No Mail Receptacle. Order Expired 6-16-73." The Internal Revenue Service was unaware that the Warner Road address and the Edlor Drive address were for the same residence. As a result it sent a second identical notice to the Warner Road address on June 20, 1973. That notice was also returned to the Service marked "No Mail Receptacle. Order Expired" (Pet. App. 5).

The government thereafter brought this suit in the United States District Court for the Southern District of Ohio to reduce to judgment petitioner's assessed income tax liability for 1968 and 1969. The district court held that the Internal Revenue Service complied with the statutory requirements for sending notices of deficiency and entered judgment for the government in the amount of the assessments (Pet. App. 3-17). The court of appeals affirmed (Pet. App. 1-2).

The court below correctly held that the Commissioner of Internal Revenue complied with the requirement of Section 6212(b)(1) of the Code that a notice of deficiency be sent to the taxpayer's "last known address." It is well established that if such a notice is sent to the taxpayer's last known address it is valid even though the taxpayer does not actually receive it. *E.g., Luhring* v. *Glotzbach*, 304 F. 2d 556 (4th Cir. 1962); *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (2d Cir. 1959); *Commissioner* v. *Rosenheim*, 132 F. 2d 677 (3d Cir. 1942). Here, in accordance with the usual practice, the notice was sent to the address shown on petitioner's tax return for the year

in issue because the Internal Revenue Service was not aware of any other address. Indeed, as the district court found (Pet. App. 5, 6), during 1968-1973, petitioner used the Edlor Drive or Warner Road addresses in his correspondence with the Internal Revenue Service with respect to his taxable year 1968. Petitioner can hardly complain of his failure to receive the notice of deficiency because he is solely responsible for the nondelivery of the notice. Despite his removal of the mailbox from his residence, he continued to use his residence address in his correspondence with the Internal Revenue Service without informing that agency that his office address was his preferred mailing address. As the district court found, petitioner's use of various addresses in his dealings with the Service "served to obscure his desired mailing address rather than to clarify it" (Pet. App. 11). Accordingly, the decision below correctly ruled that the Commissioner sent the notice to petitioner's "last known address" as required by Section 6212(b)(1).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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[1]Petitioner now argues for the first time (Pet. 6, 8) that the Commissioner failed to send the notice of deficiency to his attorney-in-fact pursuant to instructions contained in a power of attorney on file with the Internal Revenue Service. But the record contains no such power of attorney and petitioner's briefs below makes no reference to any power of attorney.

DOJ-1979-02